General Counsel's Supplemental Report
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Public Employment Relations Commission

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APPEALS FROM COMMISSION DECISIONS

Scope of Negotiations

In *Council of New Jersey State College Locals, AFT, AFL-CIO and State of New Jersey*, 336 *N.J. Super*. 167 (App. Div. 2001), aff'g P.E.R.C. No. 2000-12, 25 *NJPER* 402 (¶30174 1999), the Court held mandatorily negotiable a proposal asking the employer to contribute monies to a union-administered health fund for adjunct faculty. The Court ruled that the proposal was not preempted by the State Health Benefits Program or rendered invalid by public policy concerns against shifting public money to a private entity without accountability. The Court concluded: "These part-time employees have a strong interest in having health insurance and in obtaining that insurance on an affordable group basis. The State can protect its budgetary interest in the negotiations process." 336 *N.J. Super* at 172.

Representation Cases

The Appellate Division has affirmed the agency's denial of a request to intervene in representation elections. *Middletown Tp. and IUE Local 417 and OPEIU, Local 32*, P.E.R.C. No. 2000-47, 26 *NJPER* 59 (¶31020 2000), aff'd App. Div. Dkt. No. A-002771-99T2 (4/18/01). IUE Local 417 filed petitions seeking to represent nine negotiations units of employees of various employers. OPEIU Local 32 sought to intervene, asserting that it had merged with the units' previous majority representative, the Public Employees Service Union, Local 702. The agency denied intervention, finding that OPEIU Local 32 had taken none of the steps it could have taken to

attempt to secure the official status of PESU Local 702 before its dissolution. Specifically, OPEIU did not secure official recognition from the employers, petition for an amendment of the certifications issued to PESU Local 702, or submit contracts naming it as the majority representative. Nor did OPEIU notify employees in the negotiations units that a merger was taking place or give them a chance to discuss or vote on the merger. The Court affirmed for the reasons stated by the Commission.

Release of Arbitration Panels

The Appellate Division has affirmed a ruling of the Director of Arbitration declining to release a grievance arbitration panel. *Middlesex Cty. Sheriff's Officers, FOP Lodge 59 and Steven Eckel v. PERC,* App. Div. Dkt. No. A-1872-99T3 (1/24/01). A PBA affiliate represents sheriff's officers in Middlesex County, but FOP Lodge 59 sought to arbitrate a grievance contesting a ten-day suspension imposed on its president. The Director applied *D'Arrigo v. New Jersey State Bd. of Mediation,* 119 *N.J.*74 (1990), in concluding that the collective negotiations agreement did not authorize a demand for arbitration by an individual employee or a minority organization. The Court agreed. It added *N.J.S.A.* 34:13A-5.3 precludes a minority organization from presenting or processing grievances.

Unfair Practice Cases

Judge Feinberg of the Mercer County Superior Court enforced a Commission designee's interim relief order in *City of E. Orange and CWA*, I.R. No. 2001-3, 26 *NJPER* 399 (¶31157 2000). The order required the City to pay increments during successor contract negotiations.

Other Court Cases

Grievance Arbitration

1. Decisions Confirming Awards

The Appellate Division confirmed an award in *PBA Local 292 v. Borough of North Haledon*, App. Div. Dkt. No. A-1889-99T1 (2/01/01). The arbitrator found that the employer violated the contract when it deprived regular police officers of overtime opportunities and instead used a special police officer to fill in for absent officers on their regular shifts. Rejecting an argument that an emergency justified using the special police

officer, the arbitrator ordered the employer to pay the regular officers for their lost opportunities. The Appellate Division upheld the arbitrator's contractual ruling as reasonably debatable and rejected a claim that awarding monetary damages violated public policy. The Court stated: "The award of money compensation to the regular officers for hours unworked is not inherently against public policy but signifies recognition of the terms of the bargaining agreement as a necessity of continuing, harmonious labor relations." Slip. opinion at 3.

In *East Brunswick Tp. Bd. of Ed. v. East Brunswick Ed. Ass'n*, App. Div. Dkt. No. A-2627-99T2 (2/23/01), an Appellate Division panel upheld an award mandating that the Board pay newly-hired teachers for attending summer workshops and seminars held after they signed their employment contracts but before they began teaching. The arbitrator's award was a reasonably debatable interpretation of the contract and did not violate public policy. The Court rejected an argument that the newly hired teachers could not be considered "employees" under the parties' contract because they assertedly would not be considered "employees" under the Employer-Employee Relations Act, the education laws, the workers' compensation law, or the common law.

2. Decisions Vacating Awards

The Appellate Division vacated the monetary portion of an award in favor of a PBA local. *Hudson Cty. v. PBA Local 232*, App. Div. Dkt. No. A-1811-99T1 (2/7/01). The Court upheld the part of the award holding that the County violated the agreement when it increased the number of pay periods in 1998 from 26 to 27, thereby causing a slight dip in bi-weekly paychecks. The arbitrator's interpretation of the contract was reasonably debatable. But the Court vacated the part of the award requiring the employer to pay each employee interest on the difference between the higher and lower paychecks. The Court noted that the annual salary was paid in full and that the amount of the checks increased the next year when the number of pay periods went back to 26. The Court deemed any harm from the contractual violation to be too negligible to be remediable.

3. Other Arbitration-Related Decisions

In *Circuit City Stores, Inc. v. Saint Clair Adams*, 2001 *U.S. Lexis* 2459, 85 *FEP Cases* 266 (2001), the United States Supreme

Court held that the Federal Arbitration Act permits federal court actions to compel arbitration of employment discrimination disputes if an employer and the individual employee have agreed to arbitration. The Court rejected an argument that the FAA does not apply to employment contracts outside the transportation industry.

In *Riding v. Towne Mills Craft Center, Inc.*, 166 *N.J.* 222 (2001), a plaintiff prevailed against her employer on a LAD claim litigated through New Jersey's non-binding voluntary arbitration pilot program. That program requires a party wishing to reject an award to request a trial de novo within 30 days of the award; the employer did not do so. The plaintiff then moved to confirm the award and for the first time sought attorneys' fees. The Court held that the plaintiff had not waived that claim by not presenting it earlier; a fee-shifting claim must be resolved by a trial court unless the parties expressly agree to arbitrate it.

In *Littman v. Morgan Stanley Dean Witter*, 337 *N.J. Super.* 134 (App. Div. 2001), the Court held that an NASD agreement to arbitrate signed by a financial advisor covered a CEPA claim and thus barred his court suit challenging his termination on CEPA grounds. The Court also held that a CEPA claim was not an "employment discrimination claim" excluded from the arbitration clause.

Exempt Firemen's Tenure Statute

In *Roe v. Borough of Upper Saddle River*, 336 *N.J. Super*. 566 (App. Div. 2001), the Court held that the Exempt Firemen's Tenure Act, *N.J.S.A.* 40A:14-60-65, did not protect a fire subcode official and a plumbing subcode official against having their positions abolished when their employer entered an Interlocal Services Agreement with another town for construction code services. The Court rejected a claim, based on *N.J.S.A.* 40A:14-65, that a position could not be abolished except "in time of widespread economic depression or mandatory retrenchment." The tenure act provisions apply only when the employer's sole purpose is to remove the exempt fireman. This employer acted in good faith in entering the Interlocal Services Agreement.

The opposite result was reached in another case decided the same day by another panel, *Viviani v. Borough of Bogota*, 336 *N.J. Super*. 578 (App. Div. 2001). That case applied *N.J.S.A.* 40A:14-65 to block an employer from abolishing positions held by

exempt firemen because it was not a "time of widespread economic depression or mandatory retrenchment." The Court held it immaterial that the employer was acting in good faith for valid cost reduction reasons. The Court also held that this statute was constitutional.

Disciplinary Issues

N.J.S.A. 40A:14-147 entitles a police officer to waive a disciplinary hearing at the municipal level and to appeal the charges directly to "any available authority specified by law or regulation, or follow any other procedure recognized by a contract, as permitted by law." This statute allows a police officer in a Civil Service community to bring a removal to the Merit System Board directly. But it does not permit an officer in a non-civil service community to contest a removal directly in Superior Court. *Grubb v. Borough of Hightstown*, 333 *N.J. Super*. 592 (Law Div. 2000). The municipal hearing must be held first and then the Superior Court will review a disciplinary determination "de novo on the record below." *N.J.S.A.* 40A:14-150.

In *Pepe v. Springfield Tp.*, 337 *N.J. Super*. 94 (App. Div. 2001), the Court considered whether disciplinary charges against a firefighter provided "plain notice" of the offense of which he was found guilty. The Court held that this requirement was satisfied in the case of a firefighter who was charged with participating in making a false fire alarm, but who was found guilty of knowing that other firefighters were making such an alarm and not acting to stop them.

The Appellate Division has affirmed a decision of the Merit System Board reducing the termination of a custodian to a six-month suspension. *In re Caldwell*, App. Div. Dkt. No. A-1034-98T3 (3/13/01). The custodian was indicted for a narcotics law violation and ultimately accepted for a pre-trial intervention program, which she completed. The employer terminated her for conduct unbecoming a public employee, but the MSB applied progressive discipline concepts in holding that the termination should be reduced to a six-month suspension given the employee's unblemished work history. The employee was ordered to be reinstated in a position with no student contact. The Court upheld that ruling. However, it also held that the suspension could not start until after the pre-trial intervention program was completed and it reduced the back-pay award accordingly.

Employment Contracts

In *Miskowitz v. Union Cty. Utilities Auth.*, 336 *N.J. Super*. 183 (App. Div. 2001), the Court held that the Authority lawfully terminated the five-year employment contracts of an assistant comptroller and a deputy executive director. While the contract terms appeared to prohibit abolition of the employees' positions, the Authority acted in good faith and in response to an unprecedented fiscal crisis prompted by federal decisions invalidating New Jersey's solid waste flow orders. The Court declined to endorse a broader principle that public employers may abrogate fixed term contracts in order to save money or promote efficiency.

Overtime Compensation

In *Allen v. Fauver*, ___ *N.J.*___, 2001 *N.J. Lexis* 341 (4/1/01), the New Jersey Supreme Court dismissed a claim by State corrections officers against the State for incidental overtime wages under New Jersey's Wage and Hour Law and the federal Fair Labor Standards Act. The Court held that the Wage and Hour law's definition of "employer" did not include the State and that the FLSA did not provide the basis for a suit since the State had not waived its sovereign immunity and consented to be sued under the FLSA. Justices Long and Stein would have found a waiver of sovereign immunity based on New Jersey's Contractual Liability Act and a collective negotiations agreement covering the parties and providing for overtime compensation for incidental overtime assignments in accordance with the FLSA.

Employee Status

In *Auletta v. Bergen Center for Child Development*, ___ *N.J. Super*. ___ (App. Div. 2001), the Court held that a school psychologist was an employee of a special education school for workers' compensation purposes. In determining that the psychologist was not an independent contractor, the Court applied the "relative nature of the work" test and concluded that his work was an integral part of the school's business and that he was economically dependent on this employment. The Court found it unnecessary to apply the "right to control" test.

Forfeiture of Public Employment

In *McCann v. Clerk of the City of Jersey City*, ___ *N.J. Super*. ___ (App. Div. 2001), aff'd ___ *N.J.* ___ (2001), an Appellate

Division panel and the Supreme Court applied the general forfeiture statute, *N.J.S.A.* 2C:51-2, and the Faulkner Act forfeiture provision, *N.J.S.A.* 40:69A-166, to bar a former Jersey City mayor from running for that office again. The mayor was convicted of various acts of fraud. That these acts occurred before he became mayor did not make the forfeiture provisions inapplicable.

Police Departments

In *Murphy v. Mayor Gerald Luongo and Washington Tp.*, ___ *N.J. Super*. ___ (App. Div. 2001), the Appellate Division held that a mayor could appoint an interim police chief without the Township Council's approval. The Council, however, would have to approve a permanent appointment.

The annual report discusses *Reuter v. Borough of Fort Lee*, 328 *N.J. Super*. 547 (App. Div. 2000). The Supreme Court has affirmed that decision to the extent it holds that no police department position can be created without an ordinance being adopted pursuant to *N.J.S.A.* 40A:14-118. ___ *N.J.* ___ (2001). But this ruling must be applied prospectively given the widespread municipal reliance on the practice of establishing police positions by resolution.

Tenure

In *Merlino v. Borough of Midland Park*, ___ *N.J. Super*. ___ (App. Div. 2001), the Court held that a municipal construction official was entitled to tenure under *N.J.S.A.* 52:27D-126B. That statute provides for an initial four year term for a construction or subcode official and for tenure to accrue if an official is appointed to a second consecutive term or begins a fifth consecutive year of service. At the end of the plaintiff's first term, it was uncertain whether he would be reappointed. He and the employer agreed on a way to defer the tenure decision; the official would resign and then be appointed, ten days later, to a new four-year period. At the end of that period, the employer decided not to reappoint him, but he claimed he was now tenured. The Appellate Division agreed, holding that the statutory tenure terms preempt any different understanding between the employer and the official. The Court relied on cases construing education tenure laws.

Bi-State Agencies

In *Delaware River Port Auth. v. FOP*, ___ *F.Supp*.2d ___, 166 *LRRM* 2854 (E.D. Pa. 2001), the federal district court held that

DRPA was not obligated to bargain with a union representing police superior officers. The Court rejects New Jersey Supreme Court cases imposing labor relations obligations on the DRPA because the Pennsylvania and New Jersey labor relations statutes complement and parallel each other. *See, e.g., International Union of Operating Engineers Local 68 v. Delaware River and Bay Auth.*, 147 *N.J.* 433, 154 *LRRM* 2501 (1997), *cert. den.* 522 *U.S.* 861 (1997). Instead, the Court holds that no labor relations duties may be imposed on DRPA unless both the Pennsylvania and New Jersey legislatures expressly make their labor relations legislation applicable to DRPA.

REGULATIONS

The Commission has proposed readoption of its regulations concerning mediation, factfinding, grievance arbitration, and interest arbitration. Minor amendments are proposed. Copies of the proposed readoptions are included in the conference packets. Comments are welcome.